Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

REGER DEVELOPMENT, LLC,

Petitioner,

v.

NATIONAL CITY BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether public policy should allow lenders to continue to erode borrowers' fundamental contract rights in promissory notes, including the application of good faith and fair dealing, where lenders have inserted inconsistent language into notes that otherwise would be due "on demand"?

CORPORATE DISCLOSURE STATEMENT

Petitioner Reger Development, LLC is an Illinois limited liability company. Petitioner has no parent corporation, and no publicly held company has an ownership interest in petitioner of 10% or more.

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OPINIONS BELOW

The decision of the court of appeals is reported at 592 F.3d 759 (7th Cir. 2010) and is reproduced in the Appendix herein at 1a - 15a. The decision of the U.S. District Court for the Northern District of Illinois is not officially reported but is available at 2009 WL 1233898 and is reproduced in the Appendix at 16a - 27a.

JURISDICTION

The judgment of the court of appeals was issued on January 20, 2010. (App. 1a.) This petition is being filed within ninety (90) days of January 20, 2010 in accordance with Rule 13 of this Court. This Court has jurisdiction to review the court of appeals decision under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Reger Development, LLC ("Reger Development") is the borrower and respondent National City Bank ("National City") is the lender under a certain working capital revolving line of credit ("Line of Credit") which the parties entered for Reger Development to use in connection with its real estate development business. The Line of Credit is evidenced by various contract documents, including a promissory note and a guaranty executed by Reger Development's principal, Kevin Reger ("Mr. Reger"). All of the Line of Credit documents were on National City's non-negotiable forms. (Appendix (hereinafter, "App.") at 2a.)

After the execution of the Line of Credit documents, Reger Development from time-to-time drew funds from the Line of Credit for use in its commercial real estate development business. In accordance with the Line of Credit contract documents, National City was required to, and did, approve each such draw before it was made. Additionally, Reger Development timely made its interest payments and otherwise fully complied with its obligations under the Line of Credit contract documents. (App. 17a.)

Notwithstanding Reger Development's compliance with its obligations under the Line of Credit contract documents, on August 19, 2008, National City demanded that Reger Development make a partial payment of at least $125,000 toward the principal of the Line of Credit, which Reger Development paid the next day, even though nothing in the Line of Credit documents obligated Reger Development to accede to National City's partial payment request. Then, beginning on September 9, 2008, National City demanded changes to the fundamental terms of the Line of Credit itself. National City demanded that Reger Development "term out" $300,000 of the Line of Credit by having one of Mr. Reger's other business entities place a second mortgage on its real estate and agree to a 3-year loan in the amount of $300,000. National City also stated that it was unilaterally reducing the maximum amount available under the Line of Credit. (App. 5a.)

Importantly, under the promissory note, Reger Development had the express right to consent to any changes to the Line of Credit documents. Thus, in response to National City's revisions to the Line of

Credit, Mr. Reger expressed his surprise that National City was unilaterally changing the terms of the deal. Moreover, Mr. Reger directly questioned whether National City would call the Line of Credit if Reger Development did not consent to National City's requests. The bank responded that "there is a possibility that we may demand payment of the line . . . ," even though it acknowledged that Reger Development was not in default and had fully complied with all of its obligations under the Line of Credit. (App. 5a., 12a.)

Reger Development did not consent to National City's changes to the terms of the Line of Credit documents. Instead, Reger Development filed a complaint in Illinois state court for itself and as a class representative for all similarly situated borrowers. Reger Development's claim was, among other things, that National City breached the Line of Credit documents, including as tempered by the implied duty of good faith and fair dealing, because National City disregarded the express terms of the Line of Credit documents and abused its right to demand payment by using the threat of such a demand to unilaterally change and attempt to change the fundamental terms of the Line of Credit. (App. 5a – 6a.)

National City removed the action to federal court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(d). Diversity jurisdiction was also appropriate under 28 U.S.C. § 1332(a). Reger Development is an Illinois limited liability company with its main office and principal place of business in Tinley Park, Illinois. Mr. Reger is its sole member, and he is an Illinois citizen, residing in Tinley Park, Illinois. National City is a

national banking association with its main office and principal place of business in Cleveland, Ohio. The amount in controversy for the class is in excess of $5,000,000, which exceeds the jurisdictional amount for purposes of 28 U.S.C. § 1332(d). The amount in controversy solely for Reger Development (without regard to the class) is in excess of $200,000, which exceeds the jurisdictional amount of $75,000 for purposes of 28 U.S.C. § 1332(a). (App. 6a.)

After removing the cause of action to federal court, National City filed a motion to dismiss. In its motion, National City argued that the promissory note for the Line of Credit is simply a "demand note." As such, National City argued that the duty of good faith and fair dealing does not apply whatsoever to the Line of Credit and that National City has the absolute right to demand payment under the note at any time, for any reason, no reason and even for a bad reason. Both the district court and the circuit court agreed with National City, ruling that National City had the unfettered right to demand payment – and threaten to demand payment – without regard to the implied duty of good faith and no matter what other rights were provided to Reger Development in the Line of Credit documents. (App. 8a, 24a.)

REASONS FOR GRANTING THE PETITION

This case involves the district court and circuit court's departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. This Court should act to prevent further erosion of fundamental contract rights of borrowers where unscrupulous lenders, like National City, have inserted language into instruments that purports to give the borrowers rights, even though the lenders maintain that they can disregard any such language at their whim because the instruments are simply "payable on demand." Such lenders have perpetuated this scheme by relying on a comment to a section of the Uniform Commercial Code ("UCC") to take the place of time-honored rules of contract construction. This Court should clarify that such fundamental rules of contract construction must always be applied in the first instance, including in cases allegedly involving demand instruments.

As both the district court and circuit court recognized, courts must give effect to all of the provisions in a contract and cannot view any one provision in isolation. (*E.g.*, App. 8a.) Likewise, both the district court and circuit court recognized that a covenant of good faith and fair dealing is also implied in all contracts (including, as in this case, contracts applying Illinois law). (App. 8a, 24a.)

Yet, even though all of the provisions of a contract must be given effect, and even though a duty of good faith is implied in all contracts, both the district court and the circuit court ignored those fundamental tenets

of contract construction solely because National City claimed that the promissory note for the Line of Credit was nothing more than a pure and simple demand note. In reaching their conclusions, the circuit court and the district court principally relied on a comment to a section of the UCC. (App. 8a, 24a *citing N.W.I. Int'l Inc. v. Edgewood Bank*, 294 Ill.App.3d 247, 684 N.E.2d 401, 409, 225 Ill.Dec. 716 (Ill. App. Ct. 1997), *and* 810 ILCS 5/1-309 cmt.) As the circuit court quoted:

> Obviously this section [which imposes a requirement that lenders utilize their rights under acceleration clauses only when they have a good-faith belief that the prospect of performance is impaired] has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an obligation of payment or performance which in the first instance is due at a future date.

(App. 8a. *quoting* 810 ILCS 5/1-309 cmt.)

The district court and circuit court's conclusions, however, beg the question of whether the "very nature" of the instrument involved here was a demand note that "permits call at any time with or without reason." The courts never should have come to that conclusion because of the existence of contrary language in the Line of Credit documents.

Admittedly, and as recognized in the comment to the UCC relied upon by the district court and the court

of appeals, a simple and straightforward demand note would allow a lender to demand payment at any time, for any reason or no reason at all, without regard to the implied duty of good faith and fair dealing. However, this rule is in place because there would be no substantive contract provisions other than the demand language to interpret.

Nonetheless, courts must first follow fundamental tenets of contract construction and apply all of the terms of the contract before concluding that an instrument is simply payable on demand. If there are no substantive provisions in the contract other than the demand language, then there can be no question that the note is simply a demand note. On the other hand, if there are any provisions other than the "on demand" language for a court to construe, then the instrument is not simply a demand note, and those other provisions, as well as the implied duty of good faith, must be given effect.

For example, in the present case, Reger Development had the contractual right to consent to any changes that National City requested to the Line of Credit documents. National City sought to avoid Reger Development's right to consent by threatening to demand payment in full on the Line of Credit to coerce Reger Development into consenting to the changes requested by National City. The district court and circuit court found National City's conduct to be acceptable because they concluded that National City had the right to demand payment for any reason, including for a bad reason, because the promissory note for the Line of Credit was simply a demand note to which the implied duty of good faith did not apply.

Based on the decisions of the district court and the circuit court, Reger Development's right to consent to changes to the Line of Credit documents was rendered meaningless. It did not matter whether or not Reger Development was allowed to consent, or withhold consent, to such changes. According to the lower courts, National City could simply avoid Reger Development's contractual rights by demanding payment in full and then coming back to Reger Development with a "new" line of credit with the revised terms, knowing that Reger Development would have no choice but to accept such "new" terms since Reger Development (which National City admitted had fully complied with its obligations under the Line of Credit) could not immediately afford to pay off the full amount due under the original Line of Credit.

This conclusion flies in the face of the fundamental rules for contract construction, which provide that all provisions in a contract must be given effect in the first instance. Borrowers such as Reger Development are led to believe that they have some contractual rights, like Reger Development's right to consent here. But the lenders' inclusion of such contractual rights is nothing but an illusory promise if the lender is allowed to avoid the application of any such provisions by asserting that the instruments are simple demand notes and nothing more. It does not matter what rights the lenders have given to their borrowers if any such rights can be rendered meaningless by a bad faith demand for payment.

In fact, various other courts have properly applied the fundamental rules of contract construction to instruments that lenders have asserted are simply

payable on demand. *See, e.g., Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 32 (5th Cir. 1992); *Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9, 14 (1st Cir. 1987); *Shawmut v. Miller*, 614 N.E.2d 668, 670 (S. Jud. Ct. Mass., 1993); *New Bank of New England v. J.T. Enter., Inc.*, 1992 WL 122704, *2 (D. Mass. 1992). The circuit court, however, unduly limited the application of the decisions in those cases by distinguishing the language involved. (App. 11a.) The point of those cases, however, is that courts must always apply the fundamental rules of contract construction and give effect to all of the provisions of the parties' contract, without simply jumping to the conclusion that an instrument is a demand instrument solely because of the presence of demand language.

Indeed, the district court and circuit court's approval of National City's conduct is an invitation for unscrupulous lenders to commit fraud by promising things in contracts that they never intend to honor because the lenders know that they can hide behind the UCC's elimination of the duty of good faith in connection with any instruments containing a demand provision. The inclusion of purported contractual rights for borrowers gives the appearance to the consuming public that the instruments are not simple and straightforward demand instruments. Lenders, however, treat the instruments as though they contain only simple and straightforward demand language and nothing more such that, without regard to the consuming public's reliance on the other language in the instruments, the lenders believe they can arbitrarily demand payment. In other words, at a time when the American public is

bailing lenders out for their own malfeasance, those same lenders can bankrupt their borrowers for any reason, no reason or even a bad reason.

This case presents the Court with the opportunity to clarify that fundamental rules of contract construction must first be applied to all contracts including instruments which lenders claim are simply payable on demand. If there are any provisions in such contracts which are in any way inconsistent with the instrument being simply a demand note, then the notes are not demand notes. As such, all of the provisions of the note must be applied in full, and the implied duty of good faith and fair dealing must likewise be considered, such that lenders cannot arbitrarily call the notes for any reason, no reason or even a bad reason.

This is the only conclusion that could have been contemplated by the comment made to the UCC on which the district court and circuit court relied. If a note is a simple demand note, with nothing else, then it makes sense that the duty of good faith would not come into play. There could be no question that the lender could demand payment at any time, for any reason or no reason whatsoever, and the consuming public would have no reason to believe otherwise or to believe that the duty of good faith would somehow apply, because the borrowing public could not be led to believe that they were given any other rights.

However, once the lender puts any reference into the note that is inconsistent whatsoever with the instrument being a pure demand note, then it is misleading to the consuming public that the instrument

is treated as a demand note. If lenders are going to be allowed to hide behind a comment to the UCC which states that good faith does not apply to demand notes, then the law must require that it be crystal clear that the instrument is, in fact, a demand note and nothing more.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JANUARY 20, 2010

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2821

REGER DEVELOPMENT, LLC,

Plaintiff-Appellant,

v.

NATIONAL CITY BANK,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 08-CV-6200—**Virginia M. Kendall**, *Judge.*

Argued December 9, 2009—Decided January 20, 2010

Before FLAUM, WILLIAMS, and SYKES, *Circuit Judges.*

FLAUM , *Circuit Judge.* Reger Development borrowed money from National City through a revolving line of credit supported by a promissory note. Then, when National City discussed the possibility of calling

the note, Reger Development sued the bank for breach of contract and fraud. After reviewing the terms of the governing contract, the district court dismissed the complaint. We now affirm.

I. Background

This is a diversity case governed by Illinois law. For the purposes of this appeal, defendants-appellees accept as true the allegations contained in appellant's complaint. Plaintiff-appellant Reger Development, LLC ("Reger Development") is an Illinois limited liability company involved in real estate development. Kevin Reger is Reger Development's principal and sole member. Defendant-appellee National City Bank ("National City"), was headquartered in Cleveland, Ohio, at the time this lawsuit commenced and had lent money to Reger Development for several previous projects. In June 2007, National City offered the company a line of credit to fund potential development opportunities. On June 25, 2007, Kevin Reger met with Erica Duncan, a National City representative, to discuss the loan. At some point, when Reger asked about changing the terms of the arrangement, Duncan responded that the documents National City provided were nonnegotiable. Reger Development then executed the form contract, which was structured as a promissory note ("Note") coupled with a commercial guaranty by Kevin Reger in his individual capacity for the debt of his business entity. Reger Development attached both contracts to its initial complaint.

Appendix A

The main question in this case is whether the Note entitles National City to demand payment from Reger Development at will. To this end, several excerpts from the two-page contract are particularly important. The first clause in the Note reads:

> PROMISE TO PAY: Reger Development, LLC ("Borrower") promises to pay to National City Bank ("Lender"), or order, in lawful money of the United States of America, on demand, the principal amount of Seven Hundred Fifty Thousand & 00/100 Dollars ($750,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. Interest shall be calculated from the date of each advance until repayment of each advance.
>
> PAYMENT: Borrower will pay this loan in full immediately upon Lender's demand. Borrower will pay regular monthly payments of all accrued unpaid Interest due as of each payment date, beginning July 25, 2007, with all subsequent Interest payments to be due on the same day of each month after that.
>
> . . .
>
> FAILURE TO PAY ON DEMAND. Notwithstanding any other provision set forth in this Note, if (a) any principal owing under

> this Note remains unpaid after Lender shall have given Borrower notice of demand for payment thereof or after the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower or (b) any accrued Interest under this Note remains unpaid after the due date of that Interest, then, and in each such case, all unpaid principal of this Note shall bear Interest at a rate equal to three percent (3%) per annum above the rate that would otherwise be applicable. Interest, whether prior to or after judgment by a court of competent jurisdiction, shall continue upon the outstanding balance until paid in full, at the higher of the rate provided in this Note or the rate otherwise permitted by law.

The Note proceeds to reference payment on lender's demand several times in other provisions. It also features a "NO COMMITMENT" clause that states: "NOTWITHSTANDING ANY PROVISION OR INFERENCE TO THE CONTRARY, LENDER SHALL HAVE NO OBLIGATION TO EXTEND ANY CREDIT TO OR FOR THE ACCOUNT OF BORROWER BY REASON OF THIS NOTE." The contract then includes integration language defining it as the final and complete agreement between parties. The Note is governed by federal and Illinois law, to the extent the former does not preempt the latter. Language above the signature line specifies in capital letters that the borrower has read and understood the

terms of the document. Reger Development paid a $5000 closing fee for the line of credit.

About a year after Reger Development executed the contract, National City requested updated personal financial statements and tax returns pursuant to a clause in the Note entitling the bank to do so. The borrower complied. Through that point, Reger Development had made timely interest payments on the loan. On August 19, 2008, National City asked the company to pay down $125,000 towards the principal of the line of credit, which appellant did the next business day. Then, on September 9, 2008, National City asked that Reger Development "term out" $300,000 of the Note by having one of Kevin Reger's other businesses agree to take out a three-year loan in that amount secured by a second mortgage on some real estate. National City also notified appellant that it would be reducing the amount of cash available through the line of credit from $750,000 to between $400,000 and $500,000.

Kevin Reger "expressed surprise" about these developments and asked if National City would call the line of credit if Reger Development did not agree to the requests. The bank acknowledged that Reger Development was not in default but stated that "there is a possibility that we may demand payment of the line."

Reger Development then filed a complaint in Illinois state court accusing National City of breaching the terms of the Note. The company also alleged that National City used the form promissory note contracts

to perpetuate a fraudulent scheme in which the bank fooled people into taking out loans by concealing the fact that the principal could be called on demand. Appellee removed the case to the Northern District of Illinois under diversity jurisdiction and then successfully moved to dismiss the complaint for failure to state a cause of action under which relief could be granted. The district court rejected Reger Development's Motion for Reconsideration under Fed. R. Civ. P. 59(e). Reger Development now appeals from both the substantive judgment and denial of the motion to reconsider.

II. Discussion

We review the district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) de novo. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). When evaluating the sufficiency of the complaint, we construe it in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in her favor. *Id.* We review the district court's denial of Reger Development's motion for reconsideration for abuse of discretion and reverse "only if no reasonable person could agree with that decision." *Schor v. City of Chi.*, 576 F.3d 775, 780 (7th Cir. 2009). In his jurisdictional statement, Reger Development announces that it is appealing both the district court's decision to dismiss its original complaint and the district court's subsequent denial of Reger Development's motion for reconsideration. However, as the appellee points out, the remainder of Reger Development's brief never identifies the standard of review for a district court's

59(e) ruling, mentions the denial, or makes any substantive arguments that would require us to examine that decision. We treat this silence as a waiver of Reger Development's right to contest the 59(e) ruling, though we note that the switch in posture changes nothing about the outcome of this appeal.

The Supreme Court has described the bar that a complaint must clear for purposes of Rule 12(b)(6) as follows: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A "formulaic recitation of the elements of a cause of action will not do." *Id.* Nonetheless, a plaintiff must provide "only 'enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief.'" *Tamayo*, 526 F.3d at 1083. Furthermore, plaintiffs must plead their accusations of fraud with particularity. Fed. R. Civ. P. 9(b); *Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir. 1993) (stating that particularity requires the party to specify the "who, what, when, where, and how" of the alleged fraudulent act). We consider documents attached to the complaint as part of the complaint itself. *Int'l Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 729 (7th Cir. 1999). Such documents may permit the court to determine that the plaintiff is not entitled to judgment. *Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009).

Appendix A

A. Reger Development's Breach of Contract Claim

Under Illinois law, a plaintiff looking to state a colorable breach of contract claim must allege four elements: "(1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages." *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 814 N.E.2d 960, 967, 286 Ill. Dec. 734 (Ill. App. Ct. 2004). We construe contracts by giving their unambiguous terms clear and ordinary meaning, *Reynolds v. Coleman*, 173 Ill. App. 3d 585, 527 N.E.2d 897, 902, 123 Ill. Dec. 259 (Ill. App. Ct. 1988), in an effort to determine the parties' intent. *Harrison v. Sears, Roebuck & Co.*, 189 Ill. App. 3d 980, 546 N.E.2d 248, 253, 137 Ill. Dec. 494 (Ill. App. Ct. 1989). During our review, we do not look at any one contract provision in isolation; instead, we read the document as a whole. *Martindell v. Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 154 N.E.2d 683, 689 (Ill. 1958).

While Illinois law generally holds that "a covenant of fair dealing and good faith is implied into every contract absent express disavowal," *Foster Enter., Inc. v. Germania Fed. Sav. & Loan Ass'n*, 97 Ill. App. 3d 22, 421 N.E.2d 1375, 1380, 52 Ill. Dec. 303 (Ill. App. Ct. 1981), the duty to act in good faith does not apply to lenders seeking payment on demand notes. *See N.W.I. Int'l, Inc. v. Edgewood Bank*, 291 Ill. App. 3d 247, 684 N.E.2d 401, 409, 225 Ill. Dec. 716 (Ill. App. Ct. 1997); *see also* 810 ILCS 5/1-309 cmt. ("Obviously this section [which imposes a requirement that lenders utilize their rights

under acceleration clauses only when they have a good-faith belief that the prospect of performance is impaired] has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an obligation of payment or performance which in the first instance is due at a future date."). In light of this controlling law, appellant's complaint appears vacuous. Reger Development's allegations are "that National City breached the Contract Documents by arbitrarily and capriciously (1) demanding payment under the Line of Credit even though Reger Development was in good standing and (2) unilaterally changing and attempting to change the fundamental terms of the Contract Documents without Reger Development's consent." Reger Development attempts to substantiate the first part of the breach claim by pointing to several provisions in the Note that it believes to be fundamentally inconsistent with the nature of a demand instrument. These include the "INTEREST AFTER DEFAULT" provision, which reads, in relevant part, "[u]pon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased by adding a 2.000 percentage point margin;" the prepayment clause, which allows the borrower to pay down "all or a portion of the amount owed earlier than it is due;" and the clause that grants National City the right to access the borrower's financial information. Reger Development describes the latter as a "financial insecurity" provision that conditions the right to demand payment on some economic cause.

We are not persuaded by the suggestion that these references to due dates and default somehow overpower the repeated, explicit contract language setting forth the lender's right to demand payment at any time. A bank that wishes to call the Note can specify some future date on which it needs payment as a "due date." Failure to pay at that point in time, as well as failure to make monthly interest payments required by the Note, would constitute default, but the mere use of the terms "due date" or "default" would not alter the nature of the agreement. Similarly, the "PREPAYMENT" provision cannot bear the interpretive load that appellant wants to place on its shoulders. The clause reads: "Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments of accrued unpaid Interest." Both its content and placement (immediately following the "payment" and "variable interest rate" clauses) are innocuous. The language merely reinforces National City's right to collect scheduled monthly interest payments and does not deviate from the structure of a demand note.

Reger Development does cite to decisions from other jurisdictions holding that specified events of default may neuter contractual language describing a loan as payable on demand. *See, e.g., Bank One, Tex., N.A. v. Taylor*, 970 F.2d 16, 32 (5th Cir. 1992); *Reid v. Key Bank of S. Me., Inc.*, 821 F.2d 9, 14 (1st Cir. 1987); *New Bank of New England, N.A. v. J.T. Enter.*, 1992 U.S. Dist. LEXIS 7998, 1992 WL 122704, *2 (D. Mass.

1992). These authorities describe instruments with traits that look out of place in a demand note. Because the National City Note lacks these anomalous features, the cases have little bearing on our interpretation of the present contract. For example, *Bank One, Texas* discusses notes secured by a car and a boat that specified a payment schedule and included an acceleration clause. While the National City requirement for monthly interest payments does bear some semblance to a comprehensive payment schedule, a real schedule would cover principal payments so as not to create the impression that the lender is giving away money. Furthermore, the *Bank One, Texas* court actually distinguished the contract before it from one that a Texas appellate court identified as a demand note, *see Conte v. Greater Houston Bank*, 641 S.W.2d 411 (Tex. App. 1982), because the Bank One Note featured an acceleration clause conspicuously absent from both the *Conte* instrument and National City Note. Such a provision would indeed cast doubt on the intent of the parties to create a callable loan for the reasons Reger Development set forth if the lender can demand full payment at any time, it wouldn't need to "accelerate" the loan maturity but these concerns can't gain traction without support from contractual language. As described above, mere references to due dates do not suffice.

Similarly, *Reid* dealt with a case where the lender's president testified that a "demand" term in a clause demanding a fixed-sum payment did not mean what it said in the context of provisions conditioning such

accelerated payments and enumerating default events. Given the distinct terms of the National City Note, we find the logic of the *Reid* court to be inapplicable to the case at hand. Viewed as a whole in the light most favorable to the nonmoving party, the Note before us is plainly a demand instrument entitling National City to collect its loan whenever it wants. Furthermore, adequate consideration passed during the transaction because National City actually funded the credit line and permitted appellant to draw down funds in return for the $5000 closing fee. *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63, 611 N.E.2d 1221, 1227, 183 Ill. Dec. 573 (Ill. App. Ct. 1993) ("[A] peppercorn can be considered sufficient consideration to support a contract in a court of law . . . .").

Finally, National City's reiteration of its contractual right to demand payment during negotiations with Reger Development does not amount to a breach of the covenant to avoid modifications without consent of the borrower. The Note provides that "All such parties [who sign the Note] also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made." Reger Development claims that National City breached this covenant when the bank asked it to term out part of the line of credit, but National City did not actually impose any unilateral changes on the appellant. Rather, the bank presented Reger Development with two options: live by the terms of the Note and face the possibility of a call on the loan, or agree to restructure the terms of credit. The second alternative required

appellant's consent, as stated in the governing contract. The bank's decision to hold off on taking full advantage of its legitimate powers until it could discuss less painful possibilities with its customer is not an impermissible threat and cannot give rise to any suit for breach. Reger Development's lone citation for the contrary proposition, *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990), is a vacated opinion discussing the duties of a bank under the bankruptcy code where this Court expressly endorsed the principle that good-faith restrictions do not bind demand-note lenders. *See id.* at 1357-58; *see also id.* at 1357 ("'Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith."').

B. Reger Development's Fraud Claim

To state a fraud claim under Illinois law, a plaintiff must allege that the defendant: (i) made a false statement of material fact; (ii) knew or believed the statement to be false; (iii) intended to and, in fact, did induce the plaintiff to reasonably rely and act on the statement; and (iv) caused injury to the plaintiff. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324, 331, 65 Ill. Dec. 411 (Ill. 1982).

Appellant asserts that

> The Contract Documents show that National City engaged in a scheme to defraud Reger

> Development . . . when National City drafted the purposefully ambiguous and misleading Promissory Note and other Contract Documents, which National City intended all along to call "on demand," but about which National City intentionally and fraudulently gave a much different impression to its borrowers.

We address only the first of several reasons why this position cannot stand in court: Reger Development's failure to plead intent with any semblance of particularity. To establish element (iii) of his fraud claim, appellant asks us to draw the inference

> that no reasonable borrower would have paid $5,000 to enter into a line of credit if it had been clearly drafted to provide that the note could be called at any time and for any reason whatsoever, including a bad reason. Thus, National City had to have drafted ambiguous documents so that National City could mislead its borrowers. That is the only explanation for the ambiguous and otherwise inexplicable terms that National City included regarding defaults, maturity dates and due dates.

As we stated above, the Note before us is neither ambiguous nor inexplicable. Rather, it is a straightforward demand instrument accompanied by a personal guaranty by the borrower's sole member. With

respect to intent, we simply cannot draw the inference that Reger Development asks us to make without ignoring the contract altogether. While Illinois law permits parties to prove intent to deceive with circumstantial evidence, *see White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 856 N.E.2d 542, 549, 305 Ill. Dec. 737 (Ill. App. Ct. 2006), courts presume that transactions are fair and honest until shown to be otherwise, *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 835 N.E.2d 801, 855, 296 Ill. Dec. 448 (Ill. 2005). A "party cannot close his eyes to the contents of a document and then claim that the other party committed fraud merely because it followed this contract." *Northern Trust Co. v. VIII S. Mich. Assocs.*, 276 Ill. App. 3d 355, 657 N.E.2d 1095, 1103, 212 Ill. Dec. 750 (Ill. App. Ct. 1995). The district court described several other flaws in Reger Development's fraud claim. We agree with the lower court's reasoning but see no need to reach those issues.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's grant of National City's motion to dismiss the Reger Development complaint.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 28, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 08 C 6200

Judge Virginia M. Kendall

REGER DEVELOPMENT, LLC, an Illinois limited liability company, for itself and all those similarly situated,

Plaintiff,

v.

NATIONAL CITY BANK,
a national banking association,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Reger Development, LLC ("Reger") filed a Class Action Complaint against National City Bank ("National City") alleging breach of contract and fraud. National City has moved to dismiss Reger's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated, National City's Motion to Dismiss is granted.

Appendix B

STATEMENT OF FACTS

On June 25, 2007, Reger entered into a Promissory Note[1] and a Commercial Guaranty with National City for a line of credit.[2] Compl. ¶ 3. Before Kevin Reger ("Mr. Reger"), the manager of Reger, signed the documents, National City informed him that the Promissory Note and the Commercial Guarantee were form documents and that their language was non-negotiable. Compl. ¶ 6. Since the execution of the Promissory Note, Reger has consistently made interest payments on the line of

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1. Reger maintains that the agreement that it entered into with National City was a "Promissory Note" because it was titled "Promissory Note." The semantics of what to title the agreement is a distinction without a difference because a demand note is a promissory note. *See* Black's Law Dictionary, at 1214 (6th ed.) (defining "promissory note" as "a promise or engagement, in writing, to pay a specified sum at a time therein stated, or on demand, or at sight, to a person named therein, or to his order, or bearer"). Nonetheless, the Court will refer to the agreement as "the Promissory Note" throughout this Opinion.

2. Reger attached and incorporated by reference a copy of the Promissory Note and the Guaranty to its Complaint. *See* Fed.R.Civ.P. 10(c); *see also Int'l Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 729 (7th Cir. 1999) ("Documents attached to the complaint are incorporated into it and become part of the pleading itself."). Therefore, the Court can consider the contents of both the Promissory Note and the Guaranty when ruling on National City's Motion to Dismiss. *See Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002) (in deciding a motion to dismiss, the court can consider any documents incorporated or referenced in the complaint).

credit in a timely fashion and in accordance with the contract. Compl. ¶ 10. About a year after entering into the Promissory Note, National City requested that Mr. Reger provide it with an updated Personal Financial Statement and copies of his most recent tax returns so that National City could conduct an annual review of Reger's line of credit. Compl. ¶ 11. After Reger complied with the request, National City requested a meeting to discuss 'usage" of the line of credit. Compl. ¶ 15. At the meeting, Reger was informed that in order to keep the line of credit in place, Reger needed to make a payment toward principal to pay down a portion of the outstanding balance on the line of credit. Compl. ¶ 20. Fearful that National City would demand payment of the entire loan, Mr. Reger agreed to pay $ 125,000 toward the principal. Compl. ¶¶ 21, 23. About three weeks later, National City once again contacted Reger about its line of credit. Compl. ¶ 27. National City informed Mr. Reger that it wanted him to "term out" $ 300,000 of the line of credit by having one of Mr. Reger's other business entities agree to a 3 year loan in the amount of $ 300,000, with a 25 year amortization, and by placing a second mortgage on a piece of property owned by the entity. Compl. ¶ 28. National City would then reduce Reger Development's line of credit from $ 750,000 to between $ 400,000 and $ 500,000. Compl. ¶ 28. In response, Reger expressed his surprise that National City was attempting to renegotiate the line of credit and asked whether it would be "called" if Reger did not agree to National City's demands. Compl. ¶ 29. National City told Reger that "there is a possibility that we may demand payment of the line . . . ." Compl. ¶ 31. Reger then filed the instant suit alleging that National City breached the terms of the Promissory Note and committed fraud.

Appendix B

STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b)(6), a court must accept as true all facts alleged in the complaint and construe all reasonable inferences in favor of the plaintiff. *See Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995). To state a claim upon which relief can be granted, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff need not allege all facts involved in the claim. *See Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994). However, in order to survive a motion to dismiss for failure to state a claim, the claim must be supported by facts that, if taken as true, at least plausibly suggest that the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). Such a set of facts must "raise a reasonable expectation that discovery will reveal evidence" of illegality. *Id.* at 1965.

A party may plead itself out of court by pleading facts that establish an "impenetrable defense" to its claims. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008). A plaintiff pleads himself out of court when it would be necessary to contradict his complaint in order to prevail on the merits. *See id.* Furthermore, if a plaintiff inserts unnecessary facts into his complaint, the defendant may use those facts to demonstrate that he is not entitled to relief. *See id.*

Appendix B

DISCUSSION

I. Breach of Contract

Reger asserts that National City breached the Promissory Note by conducting an "annual review" of Reger's line of credit (requesting copies of Reger's financials), by demanding that Reger pay down a portion of the Promissory Note even though its line of credit was in good standing, and by unilaterally attempting to change the terms of the Promissory Note without its consent and then threatening to demand full payment of the line if Reger did not accept the changes. Compl. at ¶ 35.

Under Illinois law, to state a claim for breach of contract, Reger must allege: 1) the existence of a valid and enforceable contract; 2) performance by Reger; 3) breach by National City; and 4) damages to Reger. *See Zirp-Burnham, LLC v. E. Terrell Assocs., Inc.*, 356 Ill. App. 3d 590, 826 N.E.2d 430, 439, 292 Ill. Dec. 289 (Ill. App. Ct. 2005). To construe the meaning of a contract, courts first look to the contract's own language, giving the terms their plain and ordinary meaning. *See Mo. Pac. R. Co. v. Am Re-Ins. Co.*, 286 Ill. App. 3d 129, 676 N.E.2d 965, 968, 222 Ill. Dec. 1 (Ill. App. Ct. 1996). If any allegations in Reger's Complaint conflict with the parties' Promissory Note, the information provided in the contract trumps Reger's assertions in its Complaint. *See Whirlpool Financial Corp. v. GN Holdings, Inc.*, 873 F.Supp. 111, 123 (N.D. Ill. 1995) (citing *Hamilton v. O'Leary*, 976 F.2d 341, 345

(7th Cir. 1992) ("where . . . an exhibit contradicts the assertions made in the complaint itself and reveals facts that foreclose recovery as a matter of law, the exhibit controls.").

Here, the terms of the Promissory Note are plain, unambiguous and expressly permit National City to request Reger's financials,[3] to demand payment of the line of credit at anytime,[4] and to modify the line of credit

3. "Borrower will furnish to Lender, at Borrower's expense, promptly upon each request of Lender, such information in writing regarding Borrower's financial condition, income taxes, properties, business operations, if any, and pension plans, if any, as Lender may from time to time reasonably request, prepared, in the case of financial information, in accordance with generally accepted accounting principals consistently applied and otherwise in form and detail satisfactory to Lender." (Promissory Note (Financial Information) at 2; Commercial Guarantee (Financial Information) at 3).

4. "Reger Development, LLC ("Borrower") promises to pay to National City Bank ("Lender") . . . in lawful money of the United States of America, *on demand*, the principal amount of Seven Hundred and Fifty Thousand Dollars or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance." (Promissory Note (Promise to Pay) at 1); "Borrower will pay this loan in full immediately upon Lender's *demand*." (Promissory Note (Payment) at 1); "Upon Lender's *demand*, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount." (Promissory Note (Lender's Rights) at 1); "Notwithstanding any other provision set forth in this Note, if (a) any principal owning under this Note remains unpaid after Lender shall have given Borrower *notice of demand* for payment thereof . . ." (Promissory Note (Failure To Pay On Demand) at 2).

without the consent of or notice to anyone other than the party with whom the modification is made.[5] *See* Promissory Note at 1-2. Reger's assertion that other standard provisions contained in the Promissory Note ("interest after default," "no prepayment penalty," "request for financial information," and "bankruptcy or insolvency") somehow transform the Promissory Note into a loan that National City could not call except for non-payment or misuse is unconvincing. These standard provisions are in no way limitative of National City's express right to make demand at any time, for any reason, or for no reason at all. Furthermore, these provisions do not render the Promissory Note vague, ambiguous or misleading. *See Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 736 N.E.2d 145, 154, 249 Ill. Dec. 303 (Ill. App. Ct. 2000) ("[A] contract is not rendered ambiguous imply because one party does not agree to its current construction."). Lastly, Reger, through Mr. Reger, expressly acknowledged that he read and understood the contents of the Promissory Note before he signed it. *See* Promissory Note at 2 ("Prior to signing this note, Borrower read and understood all the provisions of this note . . . Borrower agrees to the terms of the note."). Therefore, even if the Court accepts the

5. "All such parties agree that Lender may renew or extend . . . this loan or release any party or guarantor or collateral . . . ; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made." (Promissory Note (General Provisions) at 2).

facts alleged in Reger's Complaint as true, they do not plausibly suggest that National City breached the Promissory Note.

Furthermore, the facts plead in Reger's Complaint do not support its conclusory allegation that National City unilaterally attempted to change the terms of the Promissory Note without its consent and then threatened to demand full payment of the line if Reger did not accept the changes. As stated in Reger's Complaint, when National City attempted to modify the line of credit it went to Reger and explained the changes it wanted to make. It did not unilaterally make any modifications to the contract without the consent of or notice to Reger. Reger's own Complaint states that when Reger asked National City whether the line of credit would be "called" if Reger did not agree to National City's proposed changes, National City responded, "there is a *possibility* that we may demand payment of the line . . . ." Compl. at ¶ 29-31. These facts, as stated in Reger's Complaint, do not support the conclusion that National City *threatened* to demand full payment of the line of credit. Moreover, if National City wanted to demand full payment of the line of credit, it was well within its rights under the Promissory Note to do so. National City had the express right, under the Promissory Note, to call, at any time, all or part of the outstanding principle. *See* Promissory Note at 1-2.

Reger asserts that National City must have breached the Promissory Note because its "reasonable expectations" were that the line of credit would continue

as long as it continued to abide by the terms of the loan. Reger's expectation, however, cannot be "reasonable" given that the plain, unambiguous language of the Note states that National City can call the line of credit on demand. *See* 810 ILCS 5/1-208 cmt. ("Obviously this section [imposing a good faith obligation on an option to accelerate payment and/or performance, or require collateral and/or additional collateral] *has no application to demand instruments or obligations whose very nature permits call at anytime with our without reason.*") (emphasis added); *see also Kham v. Nate's Shoes No. 2 Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) ("Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document. . . .[reasonable expectations] do not block use of terms that actually appear in the contract."); *N.W.I. Int'l v. Edgewood Bank*, 291 Ill. App. 3d 247, 684 N.E. 2d 401, 409, 225 Ill. Dec. 716 (Ill. App. Ct. 1997) (holding that a demand note entitles a bank to "full and immediate payment without the condition of reasonable insecurity" regardless of the parties' course of dealing). Therefore, because Reger's conclusory allegations that National City breached the Promissory Note are not only unsupported, but are directly contradicted by the plain language in the parties agreement, its Complaint fails to state a claim against National City for breach of contract.

Appendix B

II. Fraud

Next, Reger claims that National City engaged in a scheme to defraud when it "changed the terms of the lines of credit at its whim and without regard to the reasonable expectations of the borrowers under the various lines of credit." Compl. at ¶ 35. To plead a claim for fraud, Reger must allege (with particularity) that National City: 1) made a false statement of material fact; 2) knew or believed the statement to be false; 3) intended to and, in fact, did induce Reger Development to reasonably rely and act on the statement; and 4) caused injury to Reger Development. *See* Fed.R.Civ.P. 9(b) ("In alleging fraud . . ., a party must state with particularity the circumstances constituting fraud . . ."); *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324, 331, 65 Ill. Dec. 411 (Ill. 1982) (failure to plead even one of the elements requires dismissal). No where in its Complaint does Reger allege with particularity, or even identify, any false statement of material fact that National City allegedly made, nor does it identify an omission of material fact by National City. Additionally, no where in its Complaint does Reger allege that its "reasonable expectation" that its line of credit would continue so long as it made its required payments and did not draw on the line for improper purposes, was formed by anything that National City said or didn't say. In contrast, Reger's own Complaint states that National City expressly told Reger that the Promissory Note was a pre-approved form that was "non-negotiable." Compl. at ¶ 6.

Furthermore, even if Reger had identified a false statement by National City, Reger has failed to plead any facts that would allow it to allege reasonable reliance, rather the facts as pled preclude Reger from alleging reasonable reliance as a matter of law. The plain language of the Promissory Note is clear and Reger signed the contract after acknowledging that it had read and agreed to its terms. Therefore, Reger cannot now assert that he reasonably relied on representations outside the contract to his detriment. *See Northern Trust Co. v. VIII S. Mich. Assocs.*, 276 Ill. App. 3d 355, 657 N.E. 2d 1095, 1103, 212 Ill. Dec. 750 (Ill. App. Ct. 1995) ("[A] borrower is not justified in relying on representations outside of or contrary to the contract he or she signs where the signer is aware of the nature of the contract and had full opportunity to read the contract."). Reger cannot "close his eyes to the contents of [the Promissory Note] and then claim that [National City] committed fraud merely because it followed its contract." *Id.* Reger has failed to plead facts that plausibly suggest a cause of action against National City for breach of contract.

Appendix B

CONCLUSION AND ORDER

For the reasons stated, National City's Motion to Dismiss is granted.[6]

So ordered.

/s/ Virginia M. Kendall
Virginia M. Kendall, United States District Judge
Northern District of Illinois

Date: April 28, 2009

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6. The fact that Reger Development attempts to bring claims on behalf of a putative class does not preclude dismissal. *See O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) (if named plaintiffs are unable to establish a case, they may not seek relief on behalf of other members of the class.).